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CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 390.

EXPORTERS OF MANUFACTURERS' PRODUCTS, INC.,

vs.

BUTTERWORTH-JUDSON COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED JULY 1, 1921.

(28,345)

(28,345)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 390.

EXPORTERS OF MANUFACTURERS' PRODUCTS, INC.,

vs.

BUTTERWORTH-JUDSON COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 6, 1921.

1 United States Circuit Court of Appeals for the Second Circuit.

EXPORTERS OF MANUFACTURERS' PRODUCTS, INC., Plaintiff-in-error,

against

BUTTERWORTH-JUDSON COMPANY, Defendant-in-error.

This cause came here on a writ of error to a judgment in favor of the Butterworth-Judson Company in an action at law in the District Court for the Southern District of New York. Judgment resulted from the verdict of a jury and thereupon plaintiff-in-error took a writ.

The stated terms of the trial court as prescribed by Act of Congress begin each month on the first Tuesday thereof; but a general rule of that court provides as follows:

"For the purpose of taking any action which must be taken within the term of the court at which final judgment or decree is entered, each term of court is extended for ninety days from the date of entry of the final judgment or decree."

In respect of this case the ninety day period above provided for, and therefore the Term at which the final judgment in question was entered expired on the 24th of February, 1920.

2 On March 1, 1920 a written stipulation was executed between the attorneys for the parties hereto in the words following:

"It is hereby stipulated and agreed by and between the parties hereto that the November Term of the United States District Court for the Southern District of New York be extended to April 6, 1920 for the purpose of settling and filing the bill of exceptions herein."

On or before the 6th of April, 1920, but long after the 24th of February, 1920, the plaintiff-in-error proposed a bill of exceptions. Thereupon the trial Judge over the objection of defendant-in-error and on the faith of the stipulation above quoted, settled and signed the bill of exceptions annexed to the writ of error herein and now in this court.

Defendant-in-error then moved in this Court for an order striking from the record the bill of exceptions so settled as above set forth, on the ground that the same had been settled, signed and made a part of the record herein in contravention of law, in that the term had expired.

Upon consideration of this motion a question of law arises concerning which this court desires the instruction of the Supreme Court in order properly to decide the cause.

Question Certified.

Is the bill of exceptions so as above set forth settled, signed and certified to this Court in contravention of law, in that the
3 term had expired before the same was offered for settlement?

In accordance with the provisions of Section 239, U. S. Judicial Code, the foregoing question of law is by the Circuit Court of Appeals of the United States for the Second Circuit, hereby certified to the Supreme Court.

Dated at New York City, June 16, 1921.

H. G. WARD,
U. S. C. J.
CHARLES M. HOUGH,
U. S. Circt. Judge.
MARTIN T. MANTON,
U. S. C. J.

4 [Endorsed:] U. S. Circuit Court of Appeals for the Second Circuit. Exporters of Manufacturers' Products, Inc., vs. Butterworth-Judson Company. Question Certified to the U. S. Supreme Court. United States Circuit Court of Appeals, Second Circuit. Filed Jun. 17, 1921. William Parkin, clerk.

5 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA,
Second Judicial Circuit, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing certificate and statement of facts in the case of Exporters of Manufacturers' Products Inc., against Butterworth-Judson Company, was duly filed and entered of record in my office by order of said court, and as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said court, at the City of New York this 17th day of June 1921.

[Seal of United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

Endorsed on cover: File No. 28,345. U. S. Circuit Court Appeals, 2d Circuit. Term No. 390. Exporters of Manufacturers' Products, Inc., vs. Butterworth-Judson Company. (Certificate.) Filed July 1st, 1921. File No. 28,345.

(36,245)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 244

EXPORTERS OF MANUFACTURED PRODUCTS, INC.,

Petitioner,

vs.

BUTTERWORTH-JUDSON CORPORATION

ON A CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO ADVANCE CAUSE ON DOCKET

[illegible]

[illegible]

[illegible]

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 390.

EXPORTERS OF MANUFACTURERS' PRODUCTS, INC.

v.

BUTTERWORTH-JUDSON COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION TO ADVANCE.

Now comes Exporters of Manufacturers' Products, Inc., plaintiff-in-error in the Circuit Court of Appeals, by its counsel, and respectfully prays that the above-entitled cause be advanced for hearing on the next available day upon the following grounds:

1. This is an action at law brought in the District Court of the United States for the Southern District of New York. It was tried before District Judge Sheppard and a jury. A verdict was rendered for defendant and final judgment entered November 26, 1919, dismissing the complaint.

2. The stated terms of the District Court begin each month on the first Tuesday, though by general rule of the District Court it is provided as follows:

> "For the purpose of taking any action which must be taken within the term of the court at which final judgment or decree is entered, each term of court is extended for ninety days from the date of entry of the final judgment or decree."

This ninety-day period expired February 24, 1920. On March 1, 1920, a written stipulation was entered into between the attorneys for both parties, reading as follows:

> "It is hereby stipulated and agreed by and between the parties hereto that the November Term of the United States District Court for the Southern District of New York be extended to April 6, 1920, for the purpose of settling and filing the bill of exceptions herein."

An order to the same effect was entered on the stipulation by District Judge Mayer (*Exporters of Manufacturers' Products* v. *Butterworth-Judson Co.*, 265 Fed., 907).

3. On or before April 6, 1920, but after February 24, 1920, plaintiff-in-error proposed a bill of exceptions. The Trial Judge, over the objection of the defendant-in-error, and on the faith of the stipulation, settled and signed the bill of exceptions, and the case was brought to the Circuit Court of Appeals for the Second Circuit by writ of error with the bill of exceptions annexed thereto.

4. Notwithstanding the stipulation, defendant-in-error then moved in the Circuit Court of Appeals for an order striking from the record the bill of exceptions so settled, on the ground that the same had been settled, signed and made a part of the record in contravention of law, in that the term had expired. The motion was granted.

"HOUGH, *C. J.*:

The unusual facts above recited and a decision of the Supreme Court (*O'Connell* v. *United States*, 253 U. S., 142) rendered 17th May, 1920, and therefore after the action of the Court below, compel some review and revision of our judgments on the subject of settlement of bills of exceptions.

The undoubted general rule that a bill of exception must be settled within the term at which the judgment is entered, or within such further time, *i. e.*, extension of term, as may be allowed by order entered before that term's expiration, we stated in *Koewing* v. *Wilder*, 126 Fed., 472, and repeated it in respect of an effort to file a bill *nunc pro tunc* in *Reader* v. *Haggin*, 160 Fed., 909. But the right was reserved of allowing or approving the settlement of a bill after term's expiration under 'very extraordinary circumstances' (*United etc. Co.* v. *Stimson*, 175 Fed., 1023; *Glickstein* v. *United States*, 215 Fed., 90). We have also insisted that where such settlement was made after the end of the term the reason or justification for so doing should affirmatively appear by an express statement thereof (*Ulmer* v. *United States*, 266 Fed., at 181).

Under the extraordinary circumstances which withdrew a given case from the operation of the rule, we have included the illness of the trial Judge (*Roberts* v. *Bennett*, 135

Fed., 748), which of course is a disability within Rev. Stat., Sec. 953 as amended (*Schmidt* v. *Standard etc. Co.*, 202 Fed., 1023), though mere absence from the district is not such disability (*Ulmer* v. *United States, supra*).

It follows that the language quoted from the Blisse case *supra* is erroneous and that of such cases as *Dupont* v. *Smith*, 249 Fed., at 405, must be understood with the limitation that the consent of parties rises no higher, or can effect no other purpose than that of an order extending the term entered before the term's end.

We therefore grant so much of the motion as strikes from the record the bill of exceptions; holding (to quote from the O'Connell case) that the 'proceedings concerning settlement of a bill are *coram non judice*.' It may be noted that the expression of opinion by counsel on signing stipulation is immaterial.

This may render the present writ hopeless, yet does not technically require granting the second motion. We have pointed out in *Fraad* v. *Empire etc. Co.*, 250 Fed., 618, that a writ of error is usually accompanied both by a judgment roll and a bill of exceptions. Under the writ we may examine the judgment roll to ascertain its regularity (*Goldfarb* v. *Keener*, 263 Fed., 357); but only through the bill of exceptions can we examine the occurrences at trial (*Buessel* v. *United States*, 258 Fed., at 816).

As by this motion we are not called upon to investigate the judgment roll, the application to dismiss the writ of error is denied.

If, however (as in all probability is the case) the writ is idle without the bill of exceptions, the plaintiff-in-error may take dismissal, if so advised, without costs."

5. This cause was before this Court on May 2, 1921, on motion for leave to file a petition for a writ of mandamus. On May 16, 1921, the motion was denied, without opinion. The Circuit Court of Appeals on motion for reargument thereupon certified the question.

6. Upon consideration of this motion on reargument the Circuit Court of Appeals has certified to this Court the following question of law with respect to which the instruction of this Court is desired in order properly to decide the cause.

"*Question Certified.*

> Is the bill of exceptions so as above set forth settled, signed and certified to this Court in contravention of law, in that the term had expired before the same was offered for settlement?"

7. At the time this stipulation was made and the bill of exceptions settled by the Trial Judge, the practice in the Second Circuit was as stated in the case of *Blisse* v. *United States,* 263 Fed., 961-966, as follows:

> "We see no sufficient reason to hold that the bill cannot be signed by the judge after the term has expired, and that such consent may be given after the term has expired."

This Court has stated in *Michigan Insurane Bank* v. *Eldred,* 143 U. S., 293, that the bill of exceptions must be presented to the Trial Judge at the term at which the case is tried,

> "or within a further time allowed by order entered at that term or by standing rule of court or *by consent of parties.*"

Until the question certified is answered the practice in the Second Circuit is unsettled, and for the foregoing reasons the plaintiff-in-error respectfully prays that this cause be advanced on the docket.

HENRY M. WARD,
Counsel for Plaintiff-in-Error.

IN THE

Supreme Court of the United States

October Term, 1921.

No. 390.

EXPORTERS OF MANUFACTURERS PRODUCTS, INC.,

vs.

BUTTERWORTH-JUDSON COMPANY.

On a Certificate from the United States Circuit Court of Appeals for the Second Circuit.

BRIEF AND ARGUMENT FOR EXPORTERS OF MANUFACTURERS PRODUCTS, INC., PLAINTIFF-IN-ERROR IN THE CIRCUIT COURT OF APPEALS.

HENRY M. WARD,
Counsel for Plaintiff-in-Error
in the Circuit Court of Appeals.

The Hecla Press, 57 Warren St., N. Y. Tel. Barclay 6200.

IN THE

Supreme Court of the United States

October Term, 1921.

No. 390.

EXPORTERS OF MANUFACTURERS PRODUCTS, INC.,

vs.

BUTTERWORTH-JUDSON COMPANY.

On a Certificate from the United States Circuit Court of Appeals for the Second Circuit.

BRIEF AND ARGUMENT FOR EXPORTERS OF MANUFACTURERS PRODUCTS, INC., PLAINTIFF-IN-ERROR IN THE CIRCUIT COURT OF APPEALS.

Statement.

This cause is here on a certificate from the Circuit Court of Appeals for Second Circuit.

Exporters of Manufacturers Products, Inc., plaintiff-in-error in the Circuit Court of Appeals, herein referred to as the plaintiff, brought an action at law in the District Court of the United States for the Southern District of New York against Butterworth-Judson Company, defendant-in-error in the Circuit Court of Appeals, herein referred to as the defendant. The jury found for the defendant and final judgment was entered dismissing the complaint. Plaintiff within the time allowed by law took the case to the Circuit Court of Appeals by writ of error.

A general rule of the District Court provides as follows:

> "For the purpose of taking any action which must be taken within the term of court at which final judgment or decree is entered, each term of court is extended for ninety days from the date of entry of the final judgment or decree."

With respect to the instant case, the ninety-day period expired February 24th, 1920.

On March 1st, 1920, a written stipulation was executed between the attorneys for the parties, as follows:

> "It is hereby stipulated and agreed by and between the parties that the November Term of the United States District Court for the Southern District of New York be extended to April 6th, 1920, for the purpose of settling and filing the bill of exceptions herein" (Record, p. 1).

On March 1st, 1920, the District Court entered an order on the stipulation extending the term accordingly.

Plaintiff on motion applied for a further extension of thirty days. Defendant at the same time moved to vacate the order of March 1st. Judge Mayer, holding the District Court, granted plaintiff's motion to extend, and denied defendant's motion to vacate.

> *Exporters of Manufacturers Products, Inc.* v. *Butterworth-Judson Company,* 265 Fed., 907.

(The facts last recited do not appear in the certificate but are stated in Judge Mayer's opinion, of which judicial notice may be taken.)

As stated in the certificate, the Trial Judge on or before April 6th (in fact, at a later date but within the period of the term as extended by the District Court by a subsequent order), on the faith of the stipulation and against defendant's objection, settled the bill of exceptions proposed by plaintiff (Record, p. 1).

The cause was then taken to the Circuit Court of Appeals on writ of error.

Defendant then made a motion in the Circuit Court of Appeals to strike from the record the bill of exceptions,

> "on the ground that the same had been settled, signed and made a part of the record herein in contravention of law, in that the term had expired" (Record, p. 1).

The motion was granted, but, upon a motion for rehearing, the Circuit Court of Appeals certified

the following question upon which it desired the instruction of this Court:

"Question Certified

> Is the bill of exceptions as above set forth settled, signed and certified to this court in contravention of law in that the term had expired before the same was offered for settlement" (Record, p. 2).

FIRST POINT.

The validity of a stipulation for the settlement of a bill of exceptions made after the expiration of the term of the trial court, as extended by standing rule, has been repeatedly recognized by this court.

In *Ex parte Bradstreet,* 4 Pet., 102, a bill of exceptions was presented to the trial judge after the expiration of the term, but without objection by the adverse party (pp. 104-105). The court, by Mr. Chief Justice Marshall, says on this point:

> "If the party intends to take a bill of exceptions, he should give notice to the judge at the trial; and if he does not file it at the trial, he should move the judge to assign a reasonable time within which he may file it. *A practice to sign it after the term must be understood to be a matter of consent between the parties,* unless the judge has made an express order in the term, allowing such a period to prepare it." (Italics ours.)

In *Hunnicutt* v. *Peyton,* 102 U. S., 333, the rule of the Circuit Court provided:

> "No bill of exceptions will be signed unless presented to the judge within five days after the close of the trial, unless further time be allowed by the court."

The bill was presented after the five days had elapsed and the adverse party objected that it was too late (p. 353). This court, by Mr. Justice Strong, says at page 353:

> "But the rule requiring the presentation of bills for the signature of the judge within five days is not a rule which controls his action. He may depart from it in order to effectuate justice. *Stanton* v. *Embrey,* 93 U. S. 548."

The court, after an elaborate discussion of the Statute of Westminster and the practice, cites at page 358 *Ex parte Bradstreet, supra.*

In *Jennings* v. *Philadelphia B. & W. Ry. Co.,* 218 U. S., 255, this court, by Mr. Justice Lurton, says at page 257:

> "So grave a matter as the allowance of a bill of exceptions after the close of the term and after the court had lost all judicial power over the record should not rest upon a mere implication from silence. *There should be express consent or conduct which should equitably estop the opposite party from denying that he had consented."* (Italics ours.)

In *Michigan Insurance Bank* v. *Eldred,* 143 U. S., 293, the court, at page 298, says:

> "By the uniform course of decision, no exceptions to rulings at a trial can be considered by the court, unless embodied in a

formal bill of exceptions presented to the judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of court, *or by consent of parties.*" (Italics ours.)

SECOND POINT.

The District Court had the power on the stipulation to enter the orders by which the term was extended, and hence the trial judge had power to settle the bill of exceptions.

In none of the cases in which bills of exceptions have been held to have been improvidently granted, has the District Court entered an order upon stipulation.

It is submitted that the District Court had the power in furtherance of justice to set aside its rule, upon the stipulation, and extend the term, and that the order extending the term is not subject to collateral attack in the Court of Appeals.

Hunnicutt v. *Peyton,* 102 U. S., 333 (*supra*).

Life Insurance Co. v. *Francisco,* 17 Wall., 672, 679.

In *United States* v. *Breitling,* 20 How., 252, a bill of exceptions was filed after the time fixed by the rule of court. The bill was settled by the trial judge against the objection of the adverse party (p. 253). This court, by Mr. Chief Justice Taney, says at page 254:

"And it is always in the power of the court to suspend its own rules, or to except

a particular case from its operation, whenever the purposes of justice require it."

THIRD POINT.

Defendant having entered into the stipulation is estopped from questioning its validity.

It appears from the certificate by inference, and it is a fact, that plaintiff, in reliance upon the stipulation, incurred the expense of preparing the bill of exceptions and printing the record in the court below.

Passing without comment the ethics of counsel for defendant repudiating their stipulation, it is evident that the cause was in the Circuit Court of Appeals for hearing on the record and bill of exceptions and would have been heard and decided accordingly had not defendant moved to strike out. Having made the stipulation, defendant should not be permitted to repudiate it. This principle of estoppel is recognized in the decisions of this court above cited.

FOURTH POINT.

The plaintiff followed the well settled practice in the Circuit Court of Appeals for the Second Circuit.

In *Blisse* v. *United States,* 263 Fed., 961, January 12, 1920, that Court says, after citing the authorities:

> "We see no sufficient reason for holding that the bill cannot be signed after the term has expired, provided the parties consent, and that such consent may be given after the term has expired."

In the instant case the Circuit Court of Appeals, in its opinion granting the motion to strike the bill of exceptions from the record, says:

> "Recognition has always been given to the ruling in *Waldron* v. *Waldron*, 156 U. S. 361, that a bill of exceptions may be settled after the term by virtue of a consent or agreement of parties made during the term; but though no express ruling on the point has ever been made in a reported opinion by this court, examination of the files will show only consents made *after expiration of the term and all duly made extensions thereof.*" (Italics ours.)

This opinion of the Circuit Court of Appeals has not been reported, having evidently been withheld pending the instructions of this Court on the question now certified. For convenience of reference, it is printed as an appendix to this brief.

As pointed out by Judge Mayer in the instant case (265 Fed., at 908), the decision in the *Blisse* case, *supra*, settled the practice in the Second Circuit.

Plaintiff was justified, in view of the opinion of this court in *Michigan Insurance Bank* v. *Eldred*, 143 U. S., 293 (*supra*), and of the *Blisse* case, in relying and acting upon the stipulation.

FIFTH POINT.

The Circuit Court of Appeals in granting the motion to strike out, now before it on rehearing, misapprehended the decision of this court in *O'Connell* v. *United States*.

In *O'Connell* v. *United States*, 253 U. S., 142, Rule 9 of the District Court for the Northern District of California provided that for the purpose of filing the bill of exceptions, the terms should be continued for three months from the first Tuesday of the month in which judgment was entered. Rule 61 provided that the term might be extended by order *made within the extended time* but that no such extension should be granted beyond thirty days *without the consent of the adverse party* (p. 146). O'Connell was convicted September 27th and sentenced September 29th. The time as extended by rule expired December 4th. The last order for extension made prior to December 4th extended the time to December 15th. After the expiration of the three months, that is, after December 4th, the United States attorney stated in open court that he would not consent to any further extension (p. 146). On December 14th the time was extended to December 24th, and on that day to December 31st, when the bill was presented for settlement.

The United States attorney moved in April, 1918, that settlement of the proposed bill be refused and the bill stricken from the files (p. 146). The district judge expressed the opinion that the bill was too late but signed the certificate and set out the facts.

This court, citing *Michigan Insurance Bank* v. *Eldred* (*supra*), *Hunnicutt* v. *Peyton* (*supra*), *Davis* v. *Patrick*, 122 U. S., 138; *Waldron* v. *Waldron*, 156 U. S., 316, and *Jennings* v. *Philadelphia B. & W. Ry. Co.* (*supra*), said by Mr. Justice McReynolds, at page 147:

> "We think the power of the trial court over the cause expired not later than the 15th of December, 1917, and any proceedings concerning settlement of a bill thereafter were *coram non judice*."

The Circuit Court of Appeals in the instant case felt "constrained" by the decision in the *O'Connell* case to hold that, despite the stipulation, the District Court had lost jurisdiction to settle the bill. This court did not so hold. The order of the District Court in that case violated the 61st Rule in two particulars. It was made after the expiration of the three months and it was made, not only without consent of the adverse party, but against the express refusal of consent.

In all the cases cited by this court in the *O'Connell* case it is either assumed or expressly stated that a stipulation is valid even though made after the expiration of the term.

In *Davis* v. *Patrick*, 122 U. S., 138, judgment was entered June 25th; forty days were allowed by stipulation for presentation of the bill. On September 14th it was stipulated that the bill might be settled and signed before November 1st, and the record filed in this court on December 1st, *nunc pro tunc*. The term expired October 20th. The succeeding term began November 12th. The bill was allowed, signed and filed on December 8th. The record was filed here December 26th (p. 140). In

this court it was argued that the bill could not be considered. It was held that the bill was properly settled in view of the stipulation and that the delay was attributable to the judge and not to the parties, citing among other cases, page 143, *Ex parte Bradstreet* and *United States* v. *Breitling, supra.*

Waldron v. *Waldron*, 156 U. S., 361, holds (p. 378) that the consent given during the term validated the settlement after the term. The question as to the validity of a stipulation made after the term was neither involved nor discussed.

In view of the decisions of this court in *Ex parte Bradstreet, Hunnicutt* v. *Peyton and Jennings* v. *Philadelphia B. & W. Ry. Co., supra,* the *O'Connell* case, in which these decisions are cited and approved, should not be regarded as overruling them on the point that a bill may be settled pursuant to stipulation made after the expiration of the term.

SIXTH POINT.

The question certified should be answered in the negative.

HENRY M. WARD,
Counsel for Plaintiff-in-Error
in the Circuit Court of Appeals.

APPENDIX A.

HOUGH, *C. J.*:

"The unusual facts above recited and a decision of the Supreme Court (*O'Connell* v. *United States*, 253 U. S. 142) rendered 17th May, 1920, and therefore after the action of the court below, compel some review and revision of our judgments on the subject of settlement of bills of exceptions.

"The undoubted general rule that a bill of exceptions must be settled within the term at which the judgment is entered, or within such further time, i. e., extension of term, as may be allowed by order entered before that term's expiration, we stated in *Koewing* v. *Wilder*, 126 Fed., 472, and repeated it in respect of an effort to file a bill *nunc pro tunc* in *Reader* v. *Haggin*, 160 Fed. 909. But the right was reserved of allowing or approving the settlement of a bill after term's expiration under 'very extraordinary circumstances' (*United etc. Co.* v. *Stimson*, 175 Fed. 1023; *Glickstein* v. *United States*, 215 Fed. 90). We have also insisted that where such settlement was made after the end of the term the reason or justification for so doing should affirmatively appear by an express statement thereof (*Ulmer* v. *United States*, 266 Fed., at 181).

"Under the extraordinary circumstances which withdrew a given case from the operation of the rule, we have included the illness of the trial judge (*Roberts* v. *Bennett*, 135 Fed. 748), which of course is a disability within Rev. Stat., Sec. 953 as amended (*Schmidt* v. *Standard etc. Co.*, 202 Fed. 1023), though mere absence from the district is not such disability (*Ulmer* v. *United States, supra*).

"Recognition has always been given to the ruling in *Waldron* v. *Waldron*, 156 U. S. 361, that a bill may be settled after the term by virtue of a consent or agreement of parties made during the term; but though no express ruling on the point has ever been made in a reported opinion by this court, examination of the files will show cases evidencing only consents made after expiration of term and all duly made extensions thereof. And the effect of that practice is reflected in a remark (not necessary for determination of the cause in hand) in *Blisse* v. *United States*, 263 Fed., at 966, viz.: 'We see no sufficient reason to hold that the bill cannot be signed by the judge after the term has expired provided the parties consent and that such consent may be given even after the term has expired.'

"That motions affecting the judgment, such as an application for a new trial, could not even on consent be entertained after the end of the term is a rule plainly enforced in *United States* v. *Mayer*, 235 U. S. 55, because the question is not one of procedure but of power or jurisdiction, and consent cannot give jurisdiction. The settlement of a bill of exceptions, however, has been practically regarded rather as a matter of procedure than otherwise, and therefore within very wide limits subject to the consent or agreement of counsel.

"In view, however, of the O'Connell case, *supra*, and of the recent consideration thereof in *Anderson* v. *United States*, 269 Fed. 65 (70), we are constrained to the holding that the settlement of a bill of exceptions is a jurisdictional matter over which neither courts nor parties have any power or control after the end of the term as lawfully extended, either by consent given or order entered before such termination as extended.

"It follows that the language quoted from the Blisse case, *supra*, is erroneous and that of such cases as *Dupont* v. *Smith*, 249 Fed., at 405, must be understood with the limitation that the consent of parties rises no higher, or can effect no other purpose than that of an order extending the term entered before the term's end.

"We, therefore, grant so much of the motion as strikes from the record the bill of exceptions; holding (to quote from the O'Connell case) that the 'proceedings concerning settlement of a bill are *coram non judice*.' It may be noted that the expression of opinion by counsel on signing stipulation is immaterial.

"This may render the present writ hopeless, yet does not technically require granting the second motion. We have pointed out in *Fraad* v. *Empire etc. Co.*, 250 Fed. 618, that a writ of error is usually accompanied both by a judgment roll and a bill of exceptions. Under the writ we may examine the judgment roll to ascertain its regularity (*Goldfarb* v. *Keener*, 263 Fed. 357); but only through the bill of exceptions can we examine the occurrences at trial (*Buessel* v. *United States*, 258 Fed., at 816).

"As by this motion we are not called upon to investigate the judgment roll, the application to dismiss the writ of error is denied.

"If, however (as in all probability is the case), the writ is idle without the bill of exceptions, the plaintiff-in-error make take dismissal, if so advised, without costs."

The question certified appears in Vol. 275 Fed. Rep., 1022.

No. 3[illegible].

IN THE

Supreme Court of the United States.

OCTOBER TERM, 192[illegible].

EXPORTERS OF MANUFACTURERS PRODUCTS, INC.,

vs.

BUTTERWORTH-JUDSON COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF BUTTERWORTH-JUDSON COMPANY.

[illegible], DOWNEY & WALLACE,
Attorneys for [illegible]
Company.

WILLARD WALLACE, Jr.,
Of Counsel.

INDEX TO BRIEF.

TABLE OF CASES.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 390.

EXPORTERS OF MANUFACTURERS PRODUCTS, INC.

vs.

BUTTERWORTH-JUDSON COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF BUTTERWORTH-JUDSON COMPANY.

Introductory.

On behalf of Butterworth-Judson Company, defendant below, we file our brief under protest; on the ground that plaintiff failing to comply with the rules of this Court, did not file its brief three weeks before the specially assigned argument of

the present case. Such filing required that plaintiff's brief be served upon defendant, and filed, on or before February 20, 1922. It was not served upon us until March 2, 1922, and must therefore have been filed in this Court thereafter. On Saturday, February 25, 1922, at 1 P. M., plaintiff handed to us a typewritten copy of the brief which was thereafter printed, served and filed. We have made the effort and have succeeded in serving and filing our brief in strict accordance with the rules of this Court. We do so, however, protesting against plaintiff's failure as above described.

I.

Statement.

Exporters of Manufacturers Products, Inc. sued Butterworth-Judson Company in the District Court of the United States for the Southern District of New York for alleged commissions growing out of war contracts. We will hereinafter refer to the parties as they stood in the court below, plaintiff and defendant.

Upon the trial a jury rendered a verdict for the defendant and final judgment was entered November 26, 1919, dismissing the complaint.

The ninety-day period provided by a general rule of the said District Court for the extension of the term of court for the purpose of filing a bill of exceptions expired admittedly on February 24, 1920.

On the 11th day of May, 1920, long after the 24th day of February, 1920, plaintiff secured an order settling its bill of exceptions and it was thereafter filed, over the objection of the defendant. Events

occurring between February 24, 1920, when the extended term expired, and the filing of the bill of exceptions are important and must be fully understood.

The printed report (275 Fed. 1022) setting forth what took place before the Court of Appeals of the United States for the Second Circuit in connection with the present certificate, does not contain a full statement of all of the essential facts which were before that court, nor does it contain any reference to certain action taken by that court prior to the sending up of the certificate. We feel that we ought, therefore, to bring to the attention of this Court certain facts and circumstances disclosed by (1) the record which was before the District Court upon motion of plaintiff to extend the term for the purpose of settling and filing its bill of exceptions (265 Fed. 907), and (2) the record which was before the said Circuit Court of Appeals upon defendant's motion for an order striking from the record the bill of exceptions and to dismiss the writ of error.

On March 1, 1920, six days after the term had expired, the attorney for the plaintiff submitted to the attorneys for the defendant a stipulation, the purpose of which was to extend the November Term, which had thus expired, in order to allow plaintiff to settle and file its bill of exceptions.

The stipulation, as it was finally signed, read as follows:

> "It is hereby stipulated and agreed by and between the parties hereto that the November Term of the United States District Court for the Southern District of New York be extended to April 6, 1920, for the purpose of settling and filing the bill of exceptions herein. The defendant, however, reserves the right to

> object, as not noted in time, to any exceptions not noted by the plaintiff within the time specified by stipulation between the parties entered into upon the trial of this action."

Although the stipulation was signed by counsel for the defendant, the latter specifically reserved the point, at the time of signing, that a stipulation could not serve to revive an expired term (see Judge Mayer's opinion, pp. 907, 908).

Judge Mayer, on March 2, 1920, entered an order on the foregoing stipulation ordering that the November Term of the court, "for the purpose of settling and filing the bill of exceptions herein be and the same hereby is extended up to and including April 6, 1920".

On April 6, the parties both appeared before Judge Mayer upon plaintiff's motion to further extend the term, defendant appearing specially and solely to object to the jurisdiction of the court as was shown by the record which was before Judge Mayer (upon an order to show cause served upon it on April 5, 1920, why an order should not be made extending the November Term to and including May 3, 1920). It was after oral argument had upon the extending order of Judge Mayer entered April 6, that Judge Mayer, accompanying his action by a written opinion (265 Fed. 907), entered the formal order extending the term to May 3, 1920.

One expression in Judge Mayer's written opinion ought to be emphasized, in order that this Court may appreciate the position taken throughout these proceedings by counsel for the defendant and that there may be no imputation of bad faith on the part of counsel in connection with what otherwise might

seem to be an attempt to repudiate a signed stipulation. Judge Mayer said:

> "In order that the action of defendant's attorneys in opposing the motion may be understood, it is fair to state that they reserved the point as to lack of jurisdiction which they are now urging. Mr. Buckley's affidavit sets forth the following (the clerk referred to being Mr. Marshall's clerk):
>
> > 'That the attention of the clerk offering said stipulation was called to the fact that the November term of said court had expired, and that the stipulation, if executed by the attorneys for the defendant could have no effect. The clerk thereupon stated that this stipulation was the only way that he knew of extending the November term of the court, and that he believed it was the proper practice to pursue. That it was thereafter determined to sign it upon his insistence, although this office still took the position that it was of no effect.'
>
> The sole question, therefore, is this: Whether the court has power to make an order extending the term of the court for the purpose of settling and filing a bill of exceptions, after the term has expired, and where there is a stipulation consenting to the extension of the term for that purpose, signed by the attorneys for the parties after the term has expired."

In view of the foregoing it is at least gratuitous for counsel for plaintiff to say in their brief:

> "Passing without comment the ethics of counsel for defendant repudiating their stipulation, it is evident * * *. Having made the stipulation defendants should not be permitted to repudiate it."

II.

Argument.

> *"A Bill of Exceptions cannot be considered by an Appellate Court unless it was duly presented to and allowed by the Trial Judge during the term at which the trial was had, or within the time as extended by an order made during such term, or where there is a rule of court on the subject, during the time so fixed, or an extension granted before its expiration."*
>
> *Oxford & Coast Line R. R. Co.* v. *Union Bank of Richmond* (C. C. A., Fourth Circuit, 1907), 153 Fed. 723.

The statement of the above rule is not open to question. The only controversy is as to whether a *stipulation of parties*, entered into *after the term has expired*, or any order of the Court, also made after such expiration, and based upon such stipulation, can have the effect of extending the term within the operation of the rule.

Judge Mayer, in his filed opinion sustaining his own jurisdiction to make the orders here complained of, was obviously constrained to come to his conclusion by a *dictum* pronounced by Judge Rogers of the Circuit Court of Appeals for the Second Circuit in the case of *Blisse* v. *United States*, 263 Fed. 961.

Before that same court, in arguing its motion to strike the bill of exceptions from the record, defendant took the position that the said *dictum* ought clearly to be restricted, especially in view of the decision of this court in *O'Connell* vs. *U. S.*, 253 U. S. 142, which had been decided four months after the decision in the *Blisse* case. Apparently the Circuit

Court of Appeals for the Second Circuit agreed with the defendant (see copy of opinion annexed to plaintiff's brief as an appendix), and it was only upon motion for reargument that the said court determined to send the case here on a certificate.

In its brief, and in an heroic attempt to save itself, plaintiff states that the Circuit Court of Appeals in granting the motion to strike the bill of exceptions from the record, misapprehended the decision of this court in the *O'Connell* case. We respectfully submit that the Circuit Court of Appeals was properly and necessarily "constrained" by the decision of this court in that case. It cannot be said that this court's decision in the *O'Connell* case depended at all upon the refusal of the adverse party to consent to a further extension of the term. The decision is grounded firmly upon the proposition that, consent or no consent, once a term has expired, proceedings had thereafter in the cause are *coram non judice*. Indeed, there was involved in that very case the question of *waiver by the adversary*, and it was expressly urged by plaintiff-in-error, against argument by the Government, that the late filing of the bill of exceptions had been cured by such waiver.

It appears from this Court's opinion, and from an examination of the papers in the case filed here, that plaintiff-in-error claimed that the United States Attorney *had waived the objection* that the bill of exceptions came too late; precisely the situation in the case at bar; here by a stipulation, there by conduct after the bill was filed. In both cases alike, however, as well the conduct as the stipulation, the claimed waiver occurred *after the term had once expired*.

In stating the facts of the case, this Court said:

> "The court (trial court) expressed the opinion that the bill was too late *unless the United States attorney had waived objection thereto*, and on that point said: 'I am very strongly of the view that, owing to the attitude of the United States attorney, distinctly stated theretofore, which was all that could be done under the circumstances, this was not such a waiver.'"

This Court then adds:

> "But, in order that the matter might be *brought here for final determination*, the facts were set out and the certificate signed" (p. 146).

Thus it expressly appears that the question of waiver not only was in the case in the trial court, but was also particularly submitted to the court of last resort "for final determination". Moreover, the latter court expressly accepted the task assigned to it in that regard.

In the brief filed here on behalf of the Government, at pages 3 and 4, appears the following:

> "It is claimed that the United States Attorney consented to these extensions by procuring an order allowing him to propose amendments to the bill, and by in fact proposing such amendments, but these actions were not taken by the United States Attorney till a period, viz., January 9, 1917, after the July term and after the time of extension fixed by Rule 9, *supra* (R. p. 176).
>
> *We claim that, according to the decisions of this Court, no extension of time for filing a bill of exceptions and no consent by counsel to such filing are of any avail whatsoever, unless*

granted or given within the term at which judgment is rendered, or, at most in the case at bar, unless granted or given within the extended period fixed by Rule 9 supra." (Italics ours.)

The Government's brief then quotes from *Michigan Insurance Bank* v. *Eldred*, 143 U. S. 293, the precise passage which this Court quotes with approval in the *O'Connell* case, as follows:

> "By the uniform course of decision, no exceptions to rulings at a trial can be considered by this court, unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of court, or by consent of parties. After the term has expired, without the court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this court, all authority of the court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at an end."

Again, at page 9 of the Government's brief, after discussing what the United States attorney *had* done with respect to the bill of exceptions, the brief concludes:

> **"His actions, however, were immaterial in any event, for if the bill was not presented until after the court had lost jurisdiction the consent of the United States attorney given after that time could not give or restore such jurisdiction. *United States* v. *Mayer*, 235 U. S. 55, 67, 70."**

It thus clearly appears that the Government's contention was based, not alone upon the theory that there had been in fact no waiver, but as well that such waiver (*had it been established*) could be of no avail whatsoever "unless granted or given within the term * * * or within the extended period fixed by rule * * *." It is equally clear that this Court's opinion proceeds upon that same two-fold theory, for this Court quotes the very passage from the *Eldred* case relied upon by the Government in its brief in support of this proposition, and then says clearly and unmistakably:

> "We think the power of the trial court over the cause expired not later than the 14th of December, 1917, and any proceedings concerning settlement of a bill thereafter were *coram non judice*. We may not, therefore, consider the bill copied in the record."

The portion quoted above from the Government's brief, and italicized (p. 8, *supra*), and also the portion printed in heavy faced type, just above, and the Supreme Court's above quoted declaration based thereon (underlined) apply precisely to the situation presented in the case at bar. We submit that, according to the decision of this Court, no extension of time for filing a bill of exceptions, and no stipulation by counsel relative to such filing, are of any avail whatsoever, unless granted or signed within the term at which judgment is rendered. The power of the Trial Court in the instant action expired not later than the 24th of February, 1920, and the proceedings had before Judge Mayer on March 2, 1920, on April 9, 1920, on April 12, 1920, and on April 30, 1920, and the proceedings had before Judge Shepard at Pensacola, Florida, on

May 11, 1920, "concerning settlement of a bill", were *coram non judice.*

The waiver of the adversary, granted after the term of court had expired, could neither confer nor revive a jurisdiction which was thus non-existent. Indeed, in the case at bar, counsel, *far from waiving the objection*, had expressly stated, upon the signing of the stipulation, and have maintained consistently and repeatedly ever since, that the term had expired, that they were without power to revive it, and that any proceedings had after the expiration of the term would be of no effect.

The *O'Connell* case involved a conviction under an indictment charging conspiracy to violate the Espionage Act and a *penitentiary sentence of five years.* The situation, therefore, demanded all possible liberality of construction; yet the Court *absolutely refused to consider* a bill of exceptions presented late by the plaintiff-in-error.

The circumstances of the filing of the bill of exceptions are declared in the opinion of the court, in substance, as follows:

The trial took place during the July term, 1917, of the District Court of the United States for the Northern District of California; the jury returned its verdict on September 25 and sentence was pronounced on September 29; on that date, thirty days were granted for the preparation and presentation of a bill of exceptions; on October 23 an order of Court undertook to extend the time to November 15; on November 12 a like order specified November 27; on November 26 an order specified December 15; on December 14 a further order undertook to grant an extension to December 24, upon which latter date a still further extension was ordered to

December 31, and on December 31 a proposed bill was presented.

Rule 9 of the Trial Court (in which the *O'Connell* case was tried) provided:

> "For the purpose of making and filing bills of exceptions and of making any and all motions necessary to be made within the term at which any judgment or decree is entered, each term of this Court shall be and hereby is extended so as to comprise a period of three calendar months, beginning on the first Tuesday of the month in which verdict is rendered or judgment or decree entered."

Rule 61 of the same Court provided that when an act to be done in any pending suit related to the preparation of bills of exceptions or amendments thereto,

> "the time allowed by these rules may, unless otherwise specially provided, be extended by the court or judge by order made before the expiration of such time, but no such extension or extensions shall exceed thirty days in all without the consent of the adverse party."

Under the Statute, the next term, as appointed therein, began November 15, and, therefore, upon that date the Trial Term in question would have expired but for the above rules of Court. By those rules, for the purpose of filing the bill of exceptions, the term of Court was extended to December 4—three months from the First Tuesday in September.

After reviewing the above facts, and in substantially the identical language just used, the Court said:

> "The last order of court, within the extended term, designated December 15 as the final day for action."

Immediately after the above statement of facts, the Court quoted from *Michigan Insurance Bank v. Eldred, supra*, the passage which we have quoted above.

And then, just following that quotation by the Court comes the Court's conclusion:

> "We think the power of the trial court over the cause expired not later than the 14th of December, 1917, and any proceedings concerning settlement of a bill thereafter were *coram non judice*. We may not, therefore, consider the bill copied in the record. *Hunnicutt v. Peyton*, 102 U. S. 333; *Davis v. Patrick*, 122 U. S. 138; *Waldron v. Waldron*, 156 U. S. 361; *Jennings v. Philadelphia, Baltimore and Washington Railroad Co.*, 218 U. S. 255, 257."

How far this Court went in the *O'Connell* case appears from a study of the dates and facts recited in the opinion. The bill of exceptions was actually filed within a period of extension granted by the Court, and, *even under Rule 61 of the Court*, within an extension not exceeding the thirty days referred to in that rule. For, the extensions granted on September 29, October 23 and November 12, were unnecessary and idle. Rule 9 of the Court extended the term to December 4th in any event. The only extension which, therefore, became effective or necessary in extending the term was that of November 26 specifying December 15. This extension was in reality for only eleven days, viz., December 4 to 15. Then, within the term thus legally extended, came the extension to December 24, which added nine days to the eleven already granted. This gave a total extension beyond the term (as already extended by Rule 9) of twenty days. Ten more remained out of the thirty days allowed by Rule 61, which might be granted "without the consent of the

adverse party", and seven of these ten were granted by the extension of December 24 to the 31st, upon which latter date the bill was filed.

It thus becomes apparent how far-reaching was the opinion and determination of this Court. For it is clear that this Court thus establishes the rule that the "further time allowed by order" must have been "*by order entered at that term*". In other words, that the bill of exceptions must be

> "presented to the judge at the same term, or within a further time allowed by order *entered* at that term",

in the language of the *Eldred* case, *supra*, and that the bill may not be presented within a further time allowed by an order which is itself entered "within a further time allowed by order entered at that term"; that there may be an extension of the term within the term, but no further extension *within the extension*. That is the necessary result of the decision in the *O'Connell* case.

The crux of the issue in the present motion is the question of waiver or consent. We have pointed above to the fact that in the *O'Connell* case, both the Government, in its brief, and this Court in its opinion take the position that *there could be no waiver*.

Moreover, we call the attention of this Court to the fact that in the brief filed in this Court on behalf of the plaintiff-in-error, O'Connell, he exhaustively argued that the Government by filing its amendments to the proposed bill of exceptions and procuring the allowance thereof, had effectually waived objection that it had not been filed in time (Supplemental Brief, p. 4 *et seq.*). It was also pointed out that "no exception was taken to the action of the trial judge in signing the bill, no ques-

tion reserved concerning his action in so doing, and no motion made by the Attorney General in this Court to raise the question" (p. 5). The brief discusses at length and relies upon the very cases cited by this Court in its opinion denying the contention of plaintiff-in-error.

Except for the dictum of the *Blisse* case referred to above, the rule for which we are now contending is established, even in the Second Circuit, by the case of *Reader* v. *Haggin* (1908), 160 Fed. 909. In that case the Court said:

> "This Court has repeatedly held that after the expiration of the term at which the cause was tried, unless the court reserves control over the case by rule or order, it is too late to allow a bill of exceptions."
>
> (See also *Jennings* v. *Philadelphia, Baltimore and Washington R. R. Co.*, 218 U. S. 255, in which it was held that in the absence of an extending order, the trial court lost control of the case after the term closed.)

In the *Blisse* case, *supra*, the Court, in commenting upon the case of *Waldron* v. *Waldron*, 156 U. S. 361, said:

> "There was no 'consent of parties given during the term', which is recognized in *Waldron* v. *Waldron*, *supra*, as sufficient. *Non constat* that the court in that case meant that consent could not be given after the term. We see no sufficient reason to hold that the bill cannot be signed by the judge after the term has expired provided the parties consent, and that such consent may be given even after the term has expired."

But this pronouncement was unnecessary to the decision, for the Court went on to say that it *would*

not imply such a consent, and that even if an express consent had been given it would have been ineffective, because the writ of error had already removed the case into the Appellate Court.

We respectfully submit that the "sufficient reason to hold that the bill cannot be signed by the judge after the term has expired", when consent has been given only after the term has expired, which Judge Rogers found wanting at the time of the decision of the *Blisse* case, has been adequately supplied by this Court in its *O'Connell* decision. For we cannot easily conceive of this Court's allowing consideration of the bill of exceptions involved in the present case when, *in a criminal case*, it would not "consider the bill copied in the record", even under the relatively favorable circumstances therein shown.

In *United States* v. *Mayer*, 235 U. S. 55 (1914), also a criminal case, a convicted defendant applied to Judge Mayer of the Southern District of New York to set aside the judgment of conviction and for the quashing of the indictments or for a new trial. The grounds alleged were newly discovered facts, and the Court found that the facts were not earlier known to counsel and could not have been discovered by reasonable diligence. The statement of the case in the printed report contains the following:

> "Upon the hearing of the application, District Judge Mayer raised the question of the jurisdiction of the District Court to entertain it, *in view of the fact that the term had expired*. Thereupon the United States Attorney submitted a memorandum tendering his consent that the application be heard upon the merits. The application was heard and District Judge Mayer handed down his decision

granting a new trial, 'on the ground that defendant had not had a trial by an impartial jury for the reason that one of the jurors at the time of his selection, etc. * * *'. The order vacating the judgments of conviction and granting a new trial has not yet been entered, the District Judge having filed a memorandum stating in substance that the question of jurisdiction was an important one * * *.

Thereafter, * * * the United States Attorney procured an order in the Circuit Court of Appeals directing Judge Mayer to show cause why a writ of prohibition should not be issued from that court forbidding the entry of an order and vacating the judgments of conviction and granting a new trial upon the ground that the District Court was without jurisdiction to enter it."

This Court in allowing the writ of prohibition, said:

"As the District Court was without power to entertain the application, the consent of the United States Attorney was unavailing. * * * It is argued, in substance, that while consent cannot give jurisdiction over the subject matter, restrictions as to place, time, etc., can be waived. * * * This consideration is without pertinency here for there was no general jurisdiction over the subject matter, and it is not a question of the waiver of mere 'modal or formal' requirements, of mere private right or personal privilege. In a Federal Court of competent jurisdiction, final judgment of conviction had been entered and sentence had been imposed. The judgment was subject to review in the Appellate Court, but so far as the Trial Court was concerned it was a finality; the subsequent proceeding was, in effect, a new proceeding which by reason of its character invoked an authority not possessed. In these circumstances, it would seem to be clear that

> the consent of the prosecuting officer could not alter the case; he was not a dispensing power to give or withhold jurisdiction. *The established rule embodies the policy of the law that litigation be finally terminated, and when the matter is thus placed beyond the discretion of the court it is not confided to the discretion of the prosecutor.*" (Italics ours.)

In *Oxford & Coast Line R. R. v. Union Bank of Richmond, Virginia, supra*, the Court said:

> "* * * In the absence of a rule to the contrary, a party against whom there is a judgment in an action at law is entitled to prepare and file a bill of exceptions during the term at which the case was tried relating to questions reserved at the trial. However, in the district in which this case was tried there is a rule of court which only allows twenty days in which to prepare and file a bill of exceptions. Notwithstanding this rule, the Court had the power to extend the time in which to prepare and file a bill of exceptions, provided it did so within the twenty days; but, once the Court permitted the twenty days to expire, *then it no longer had the power to extend the time*, and the case would stand just as though the term had expired."

The Court further announced the underlying policy of the rule of law upon which we are insisting as follows:

> "* * * While it is not the policy of the Court to dismiss writs of error and cases on appeal on account of slight technicalities, at the same time the rules of this Court, as well as the rules of the Circuit Court, are plain and easily understood. In this instance, the provision of the statute relating to the question at issue is mandatory and must be enforced. It is incumbent upon attorneys who practice

> in the Federal Courts to observe and strictly follow the rules of practice and procedure in preparing and presenting bills of exceptions. * * * It is essential to the orderly procedure of the courts that attorneys should comply with the rules relating to the same; otherwise, it would be useless to promulgate rules for the guidance of those who may seek to review the action of the lower court."

Upon the oral argument before Judge Mayer, the Court seemed inclined to fear the restriction which would be placed upon him by an application of the rule in the *Mayer* case referred to above. In his filed opinion, however, Judge Mayer seeks to distinguish the former case in which he had figured, upon the ground that it "seemed to be confined" to motions or proceedings designed to set aside or nullify a judgment on grounds having no relation to a bill of exceptions (265 Fed. 907).

We submit that the very element of distinction thus pointed out by Judge Mayer only serves to emphasize the incorrectness of his application of the rule. In that case a convicted defendant sought a new trial on the ground of newly discovered evidence (found by the court to satisfy all of the legal requirements as to prior notice, due diligence of counsel, etc.). The United States Attorney, presumably because of the glaring nature of the alleged injustice done to the defendant, had waived the jurisdictional question and consented that the application be heard upon its merits.

In spite of this, however, this Court held that

> "the established rule embodies the policy of the law *that litigation be finally terminated* * * *";

and that when a case passed outside the control and discretion of the court itself, such discretion

did not thereupon become conferred upon the district attorney. Precisely so in the case at bar. The term ended on February 24, 1920, and certainly if the court itself could not thereafter have entered an order in the case (because jurisdiction had utterly gone from it), the parties could not by agreement revive such jurisdiction and start all of the processes of the court revolving again.

Where would plaintiff have the application of its principle end? If parties can come into court with a stipulation, reviving an expired term six days after it has elapsed, why not six months or six years? If parties can thus confer jurisdiction upon a court, why not in any case?

> "Consent of parties cannot give the courts of the United States jurisdiction, but the parties may admit the existence of facts which show jurisdiction, and the courts may act judicially upon such an admission."
>
> *Railway Company* v. *Ramsey*, 22 Wall. 322.

At page 7 of its brief, plaintiff states that:

> "It appears from the certificate by inference, and it is a fact, that plaintiff, in reliance upon the stipulation, incurred the expense of preparing the bill of exceptions and printing the record in the court below."

Not only can no such inference be drawn, but plaintiff knows full well that the facts are precisely contrary to any such deduction. Plaintiff states that judicial notice will be taken of Judge Mayer's opinion. It appears from that opinion that on April 9, 1920, more than a month before the bill of exceptions was even presented for settlement, both parties were before the court (defendant appearing

specially and solely for the purpose of objecting to the jurisdiction of the court), and that defendant had reserved, from the very moment of signing the stipulation, the point which it was then arguing.

Then was the opportunity for plaintiff to have counted the cost of his proposed trip to Florida to settle the bill of exceptions, and of printing a voluminous record. Defendant would certainly have been agreeable, had Judge Mayer denied the contention of plaintiff at that time, refused to extend the term, and allowed plaintiff to go to the Circuit Court of Appeals (and to this Court, if it should be permitted) *with the bare question of practice*. Plaintiff took his chance in reliance upon what it conceived to be the law. Defendant cannot and will not now share that responsibility.

Plaintiff's Cases.

Plaintiff relies largely upon *Ex parte Bradstreet*, 4 Pet. 102. This is the first case used by plaintiff under its first point which seeks to establish that "*the validity of a stipulation* for the settlement of a bill of exceptions made after the expiration of the term *has been repeatedly recognized by this court*". We find no such recognition in the *Bradstreet* case. There is nothing said in the course of the entire opinion, and certainly not in the portion quoted by plaintiff, about a stipulation made after the term has expired. For all that appears, the "consent between the parties" was entered at the trial. Moreover, in that case, the reference to consent was not only *dictum*, but related to the old custom of the court's reducing the exceptions to writing in his own hand during the progress of the trial, and to the embarrassments, accompanying that practice,

of lapse of memory, etc. Plaintiff's dire necessity appears from nothing more clearly than from this far reach back into principles of the law developed to apply to conditions which have entirely passed away.

Plaintiff's next case is *Hunnicutt* v. *Peyton*, 102 U. S. 333. Plaintiff's quotation from the opinion of the court ends opportunely for plaintiff's argument. The next sentence furnishes the gist of the opinion. In the Circuit Court, in which the case was tried, there was a rule which provided that a bill of exceptions must be presented to the judge within five days after the trial "unless further time be allowed by the court". The bill of exceptions was presented by the appellant to the Circuit Court after those five days had expired, but the court itself allowed the late presentation. The bill of exceptions was presented "*during the term at which the cause was tried*". In holding that such allowance of the bill of exceptions was unobjectionable, this court held that the rule requiring the presentation of bills for the signature of the judge within five days was not a rule which controlled the action of the court, but that it might be departed from by the court itself in order to effectuate justice. In the sentence succeeding the portion quoted by plaintiff, this court characterized the rule as follows:

> "It is a direction to the parties, *and it expressly reserves the power to enlarge the time.*"

That case involved no attempt on the part of an appellant to file a bill of exceptions after the expiration of the term. It merely involved the presentation of the bill after the arbitrary five-day period had expired, and the rule setting up the five-

day period itself reserved to the court power to enlarge it.

Plaintiff next relies upon *Jennings* v. *Philadelphia, B. & W. Ry. Co., supra,* referred to in our brief above. Plaintiff underscores, in quoting from the opinion of this court in the *Jennings* case, a portion of the opinion which is entirely *obiter.* In that case, this court held that the bill of exceptions, filed after the term had closed, could not be considered. Mr. Justice Lurton, in delivering the opinion of the court, stated:

> "Not only had the term closed, but an appeal had been allowed and perfected. The trial court had thereby lost control of the cause, and had no authority to add to or take from the record."

After coming to the above conclusion, the court passed to consider the argument which had been advanced by appellant that if the appellee had consented to the late filing of the bill of exceptions,

> "such consent should be given the force of an order in term or a rule of court."

The court, granting for the sake of argument that that might be so, stated that the order settling the bill of exceptions did "not profess to have been founded upon consent", but that appellant was simply attempting to presume consent from the fact that appellee did not object when the bill was presented.

While this court did imply that express consent, or conduct which should equitably estop the opposite party, might have been considered by the court in connection with this argument put forth by the appellant, the court refused to find that any

such conduct or consent was present in the case before it.

Granting, however, that the foregoing implication arises from the opinion of this Court in the *Jennings* case, we submit that such an inference cannot be drawn therefrom since the decision of the *O'Connell* case. This Court has there squarely met the situation and has established, without leaving room for the slightest doubt, that proceedings had in a case after the expiration of the term at which the case was tried are, and can be, of no legal effect.

It is difficult to understand why plaintiff includes any reference to *Davis* v. *Patrick*, 122 U. S. 138. It appears from plaintiff's own statement of the facts involved in that case that more than a month before the term expired both parties stipulated for an extension of the time within which the bill of exceptions might be settled, filed and signed. The signing and filing actually took place subsequent to the extended date thus agreed to, but this Court held that the delay was attributable to the judge and not to the parties. Holding that a party, prevented by a court from filing a document on time, will not be penalized for his late filing falls far short of constituting authority for the proposition that a party admittedly in default can cure such default and revive a jurisdiction which has expired, by securing from his adversary a stipulation.

III.

The question certified should be answered affirmatively.

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